DATE: August 22, 1995
CASE NO. 93-ERA-44

IN THE MATTER OF

DOUGLAS HARRISON,

COMPLAINANT,

v.

STONE & WEBSTER ENGINEERING GROUP,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R. D. and O.) issued on November 8, 1994, by the Administrative Law Judge (ALJ) in this case arising under section 211 (employee protection provision) of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988 & Supp. V 1993). The ALJ has recommended that the complaint be dismissed because Complainant failed to prove that his protected activity was the likely reason for his demotion and transfer to a less desirable work assignment. R. D. and O. at 30. I disagree.

FACTUAL BACKGROUND

The ALJ has thoroughly recounted the facts. R. D. and O. at 3-21. Very briefly, Respondent, Stone & Webster Engineering Group, contracted with the Tennessee Valley Authority (TVA) to perform construction and maintenance at the Browns Ferry Project, a three-unit nuclear facility located near Huntsville, Alabama. Complainant, Douglas Harrison, was employed by Respondent at Browns Ferry from June 1992 until being laid off due to a reduction-in-force in April 1993. Harrison began work as a journeyman ironworker. In August 1992, he was promoted to

[PAGE 2]
ironworker foreman, and in October 1992 he was promoted to lead foreman. Due to a reduction-in-force, he again became a foreman in November 1992, but was restored to lead foreman in January 1993.

On February 1, 1993, Harrison conducted a weekly safety

meeting with his two crews of two foremen and 13 or 14 ironworkers and another lead foreman and his crews of about the same size. *Compare* Complainant's Exhibit (CX) 1 *with* Joint Exhibit (JX) 4. Management representatives also attended, including Stephen Ehele, the chief construction supervisor, and Wayne Tennyson, a senior construction supervisor. In January 1993, Ehele had been transferred to the Unit 3 drywell where Harrison and his crews were working. The ironwork maintenance and modification work at Unit 3 entailed seismic upgrade of platform steel.

At the meeting, "the guys' big beef was firewatch," a safety concern that they had raised previously but that never had been resolved.[1] Hearing Transcript (T.) 25. It similarly was not resolved during the safety meeting. The ironworkers were quite vocal in their complaint, and Ehele "caught most of the heat." T. 26. As the meeting concluded, Harrison was approached by his foremen who implored him finally to settle the complaint. Harrison thereafter met with personnel in TVA's firewatch training and fire protection departments, including TVA fire marshall Jerry Wallace, who advised him that the existing firewatch procedure violated Respondent's fire protection program. Respondent's Exhibits (RX) 1, 2. He then accompanied laborer lead foreman David Sparks to meet with Ehele and advised him that he was out of compliance. Ehele objected that they were "eating him alive on man hours in that drywell" as it was. T. 39. Nothing was resolved, and Harrison finally departed after advising Ehele that Wallace wanted to discuss the procedure with him.

Upon arriving at work on February 2, Harrison discovered that the complaint still had not been resolved and that Ehele had not even contacted Wallace about it. Harrison then complained to the Nuclear Regulatory Commission (NRC). Later, after attending a training class which concluded at about 2 p.m., Harrison was

informed by supervisor Tennyson that he had been demoted to foreman.

On February 3, Harrison elected to work as a journeyman ironworker rather than bump one of his own foremen as the apparent result of his safety activities.[2] He went to work for Terry Keeton, whom he previously had supervised, organizing steel pieces near the turbine building. Later, with the permission of R. Eugene (Ross E.) Hannah, the remaining lead foreman, Harrison advised the crews that the firewatch complaint had not been

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[PAGE 3]

addressed and that he had been demoted. The ironworkers then refused to work without proper fire protection. In response, Ehele called a meeting with management, the union, the laborers and the ironworkers, at which time the complaint was resolved by assigning firewatch duties exclusively to an increased number of laborers.

On February 4, Ehele ordered Harrison to an outside crew.[3] Harrison was taken outside by Larry (Doc) Morrow, the ironworker job steward, who related Ehele's statement that Harrison "was to get out of there, that [he] was a troublemaker, and that [he] was like Moses standing at the Red Sea to the ironworkers in that drywell." T. 66 (Harrison).[4] Harrison's exit from the drywell occurred about 45 minutes after he had related the events of the preceding four days to Brownie Harrison, a TVA construction supervisor.

DISCUSSION

The ALJ found (1) that Harrison engaged in protected activity by making internal safety complaints and contacting the NRC and (2) that while Respondent was aware of the internal complaints, it had no knowledge that Harrison had complained to the NRC. R. D. and O. at 23-26. I agree. The record fully supports these findings.[5] With regard to the ALJ's discussion of the applicable legal standard, R. D. and O. at 22 and n.3, I note that ERA section 211(a)(1) now expressly protects both internal and external safety complaints.

I disagree with the ALJ in his analysis of adverse action. In deciding whether Respondent took adverse action in demoting Harrison, the ALJ states: "Complainant cannot show that [Respondent] discriminated against him by reducing him from his lead foreman position. Respondent offered him a foreman position, which Complainant refused to take, opting, instead, to take a job in a crew, as a journeyman ironworker." R. D. and O. at 26. To the contrary, in wrongfully deciding to demote an employee to a less responsible, lower-paying position, an employer discriminates against the employee with respect to his compensation, terms, conditions, or privileges of employment by depriving him of the more desirable position. The fact that the employee decides to quit, for example, instead of accept the demotion bears solely on the remedy. Unless constructively discharged in such a situation, an employee is not eligible for post-resignation damages and back pay or for reinstatement. *Nathaniel v. Westinghouse Hanford Company,* Case No. 91-SWD-2, Sec. Dec., Feb. 1, 1995, slip op. at 20-21. Here, Harrison accepted a still lower-paying job than he was offered initially. That he further damaged himself would not eliminate

the discrimination. It would, however, limit his recovery.

The ALJ also found that Respondent demoted Harrison for a

[PAGE 4]

legitimate, nondiscriminatory reason. R. D. and O. at 26-27. The question is close.

On January 27, 1993, James Butts, Respondent's field manager and Ehele's superior, reviewed the craft roster and directed Ehele to examine the ratio of journeymen ironworkers to foremen to determine whether supervision was top heavy. According to Butts, the ratio should be six to eight ironworkers for each foreman. T. 421-422, 474. Butts testified: "When I picked [the roster] up and looked at it specifically for the ironworkers, there was 38 ironworkers and there was nine foremen on the roster, or there was nine people out of that 38 that was designated foremen. Just simple division told me that was only three people per foreman, so I questioned it." T. 421.

An examination of the roster for February 1, *see* JX 4, which was identical to that for the preceding week, shows a breakdown of 29 journeymen, seven foremen, and two lead foremen. Harrison supervised two crews, each consisting of a foreman and six to seven journeymen which is a ratio of four people for each foreman. More of a problem, however, lay with one of Hannah's foremen who supervised only two journeymen and with two employees (Thomas Willis and Willie Fulks) who were classified as foremen and who received foreman wages, but who supervised no employees. In the final analysis, Butts decided to retain these employees at the foreman wage. No adjustment was made for the two-man crew.[6] Harrison's demotion is consistent with Butts' purported "rule of thumb" of three to five crews for each lead foreman, but is inconsistent with Harrison's January 1993 promotion to supervise fewer than three crews. T. 474, 525-526. I also note that the total number of ironworkers did not decrease coincidentally with Harrison's demotion. T. 527.

A further difficulty with Ehele's decision is its timing.[7] Butts directed Ehele to review the roster on January 27, and Ehele responded with his decision "either that afternoon or the next morning." T. 423. Yet, Respondent waited six days, until February 2, to advise Harrison of his demotion, coinciding with the second day of his safety activities. The timing then is somewhat irregular. Timing notwithstanding, without the additional evidence of Ehele's animus, I might have agreed with the ALJ's finding that Harrison was demoted solely because Respondent reassessed its need for foremen.

Ehele expressed animus against Harrison for his leadership role in the firewatch complaint when, on February 4, he referred to him as a "troublemaker" and as "Moses parting the Red Sea to the ironworkers in the drywell." He also exhibited animus by removing Harrison from the drywell and transferring him to an outside crew. Morrow's account shows that Ehele was agitated when he ordered Harrison outside. T. 307-308, 329, 331. *See*

[PAGE 5]

n.4, *supra.* In retrospect, the tenor of Ehele's response to Harrison concerning the February 1 confrontation suggests that animus was also present at that time. Ehele was not then

disposed to address the firewatch complaint, responding instead that they were "eating him alive on man hours in that drywell" as it was, and he did not consult Wallace, TVA's fire marshall, as Harrison requested.

Additionally, the circumstances in which Harrison was demoted were circumspect. Respondent initially had perceived a supervisory imbalance, but discovered that two employees classified as foremen were not supervisors and thus not part of the equation. They were retained at the foreman wage, however. Of the remaining options available to correct the perceived disparity, only Harrison was demoted. The demotion occurred immediately following his confrontation with Ehele and a mere month after he had been promoted to supervise the same number of crews that Respondent now deems too few. In fact, Harrison's demotion was the only step taken by Respondent to reorganize, which did not achieve the professed result. Rather, Butts' ratio required elimination of additional foremen. *See* n.6, *supra.* The demotion left Hannah, the remaining lead foreman, with widespread responsibilities which Harrison testified he would have felt uncomfortable assuming had he been offered the position. T. 121-122. Morrow also testified that Hannah was "overloaded" in comparison to the other crafts on the project. T. 314.

While a supervisory reorganization, even of such miniscule proportion, offered a legitimate reason for demoting Harrison, I find that Harrison's participation in the firewatch complaint also entered into the decision. Respondent was presented with an opportunity to reorganize, and did so only as to Harrison, in part, because of the complaint. Accordingly, this case requires a dual motive analysis, where a respondent "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" *Mackowiak v. University Nuclear Sys., Inc.,* 735 F.2d 1159, 1164 (9th Cir. 1984), *quoting NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403 (1983). Respondent has not demonstrated on this record that it would have demoted Harrison, even if he had not engaged in protected activity. The record contains no evidence that Respondent acted similarly during other reorganizations, or that procedures in place for reorganizing its work force dictated this result. Harrison thus prevails on this aspect of the complaint.

The ALJ also found that Ehele's decision to transfer Harrison to a less desirable position on the outside crew was not retaliatory. I disagree. In making this finding, the ALJ focused exclusively on Harrison's initial protected complaint, rather than considering the manner in which events escalated.

R. D. and O. at 30. Indeed, Harrison's communication to the crews, which resulted in their refusal to work without mandated fire protection, constituted separate protected activity.

In speaking to the crews on February 3, Harrison was in effect complaining that the firewatch complaint had not been addressed and that he had been demoted after having complained. This communication, then, constituted an early version of Harrison's section 211(b) discrimination complaint, which is protected under section 211(a)(1)(D) as a proceeding commenced or

about to be commenced under the ERA. 42 U.S.C. § 5851(a)(1)(D) ("[n]o employer may . . . discriminate against any employee . . . because the employee . . . commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter").

That the complaint was communicated to co-workers does not defeat protection. Section 211(a)(1)(D) prohibits discrimination because an employee has made a complaint. *Cf. Marshall v. Whirlpool Corp.*, 593 F.2d 715, 724-725 (6th Cir. 1979), *aff'd,* 445 U.S. 1 (1980) (making a complaint is an implied initial step in commencing a formal proceeding and deserves protection under remedial safety and health legislation). It does not specify to whom the complaint must be made. In a case brought under the analogous employee protection provision of the Surface Transportation Assistance Act, the Secretary held protected a truck driver's safety complaint made to a co-worker over a citizens' band radio. *Assistant Secretary for Occupational Safety and Health and Moravec v. HC & M Transportation, Inc.*, Case No. 90-STA-44, Sec. Rem. Dec., July 11, 1991.

Federal courts similarly have held under the Occupational Safety and Health Act (OSH Act) that complaints to private parties other than employers are protected. *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984), *aff'd on other grounds,* 760 F.2d 253 (2d Cir. 1985) (report of OSH Act violations to collective bargaining representative); *Donovan v. R.D. Andersen Constr. Co.*, 552 F. Supp. 249, 252 (D. Kan. 1982) (published interview by newspaper reporter concerning safety and health hazards at worksite); *Dunlop v. Hanover Shoe Farms,* 441 F. Supp. 385 (M.D. Pa. 1976) (complaint to attorney about worksite conditions). The *Diplomat* court stated expressly that complaints to co-workers are protected:

> The purpose of the statute is to encourage employees to come forward with complaints of health hazards so that remedial action may be taken. In the ordinary course of events, an employee who notices a health hazard will begin by bringing the matter to the attention of those with whom he deals directly in his daily worklife such as the employer, supervisors, co-workers, or union

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> officials. This is simple common sense. These persons are the ones most likely to be in a position to obtain information regarding the alleged hazard and to take appropriate action.

587 F. Supp. at 1424.

A complaint to a co-worker may be the first step in the complaint process and thus specifically comes within the "about to commence or cause to be commenced" language of many employee protection provisions including the ERA. 42 U.S.C. § 5851(a)(1)(D). This rationale underlies *Hanover Shoe Farms,* 441 F. Supp. at 388 (complaint to attorney covered because retention of counsel to represent complainant constitutes first step in exercise of employee rights) and *Andersen,* 552 F. Supp. at 253 (comments to newspaper reporter protected because "[i]t is clear that proceedings could be instituted after

an employee's communication with the media").

Discrimination against Harrison because of his role in the crews' work refusal also is prohibited. The ERA accords employees the right to refuse "to engage in any practice made unlawful by [the Act]." 42 U.S.C. § 5851(a)(1)(B). It is uncontroverted that the crews refused to work without mandated fire protection and that inadequate firewatch coverage exposed workers to the hazard that a fire would not readily be detected. TVA's firewatch training and fire protection departments confirmed that the procedure being implemented violated the Fire Protection Program Plan. JX 1 at 94. Indeed, a basis for the crews' complaint was that the procedure was contrary to that being taught in TVA's training sessions.

ERA section 211(a) provides in relevant part:

> (1) No employer may . . . discriminate against any employee . . . because the employee (or any person acting pursuant to a request of the employee) . . . (B) refused to engage in any practice made unlawful by this Act . . . (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter . . . (E) testified or is about to testify in any such proceeding or . . . (F) assisted or participated . . . in any manner in such a proceeding . . . or in any other action to carry out the purposes of this chapter . . . .

42 U.S.C. § 5851(a)(1). There is no record evidence that Harrison requested the crews to refuse work, section 211(a)(1)(B), only that upon leaving the meeting, "he heard someone say that the men should not go back to work until the

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[PAGE 8]

fire watch problem was straightened out." R. D. and O. at 10. At the very least, however, in communicating the status of the firewatch complaint to the crews, Harrison "assisted or participated" in its resolution which came about because of the crews' response to the communication. He thus would be protected under section 211(a)(1)(F).

I agree with the ALJ, R. D. and O. at 28, that transfer to the outside crew adversely affected Harrison's terms, conditions or privileges of employment although no wage rate differential apparently was involved. Transfer to a less desirable job may constitute adverse action. *DeFord v. Secretary of Labor,* 700 F.2d 2281, 283, 287 (6th Cir. 1983) (although rate of compensation not changed, transferred employee "found he was not welcome, that he was no longer a supervisor, and that his job was by no means secure"). *See Jenkins v. U.S. Environmental Protection Agency,* Case No. 92-CAA-6, Sec. Dec., May 18, 1994, slip op. at 14-16 (employee transferred from challenging, technical position that utilized her qualifications fully and required community interaction to isolated, administrative position). The instant record shows that crews working "outside . . . the containment vessel around the reactor . . . did jobs like putting up chain link fences or fabbing stuff in the fab shop . . . ." T. 126.[8] Inside work, on the other hand, was

more involved and received more "emphasis [and] attention."

T. 71-72. It was considered "on the critical path" in the development of the drywell.[9]

Finally, the dispatch with which Harrison was transferred following the protected activity, in conjunction with Ehele's expression of animus in referring to Harrison as a "troublemaker" and "Moses parting the Red Sea," is sufficient to establish causation. Respondent's only explanation for transferring Harrison was that he requested it. Ehele testified that on February 2 he was called away from a meeting to speak to Harrison and Morrow, as follows:

Q. Did you leave the meeting?

A. Yes, sir. Mr. Morrow motioned and asked if I would come out in the hallway, sir. . . .

Q. What did he ask you?

A. He asked if I have a problem with Mr. Harrison being assigned to another area other than a dry well.

Q. Was Mr. Harrison standing alongside of him at that time?

A. Yes, sir, he was.

Q. And what was your response?

A. Under the circumstances I have no problem.

T. 627. Ehele does not recall anyone else leaving the meeting to speak to Harrison and Morrow. T. 626-627. The ALJ ostensibly declined to find that this event

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occurred, only that it occurred "according to Mr. Ehele . . . ." R. D. and O. at 30. Harrison testified that he neither requested a transfer from Ehele nor mentioned such a request to Morrow. T. 125. Morrow testified that he was never present outside a supervisors' meeting with Ehele and Harrison, and that Ehele never told him in Harrison's presence that he would grant a request to transfer Harrison outside. T. 307-308. As to the ALJ's statement that Harrison "admitted that he did not remember where his supervisors assigned him," R. D. and O. at 29, an examination of the remainder of his testimony reveals a very specific account of who was supervising him and what he was doing in the interlude between demotion and transfer. T. 60-61, 64-65, 124-125, 128.

The ALJ also states that Harrison's communication to the crews occurred at an "unauthorized meeting" and that the transfer "if not made at [Harrison's] request, was motivated by [his] unprotected activity in assembling the ironworkers which resulted in a work stoppage." R. D. and O. at 30. This characterization is less than accurate. Harrison spoke briefly to crews already assembled by Hannah, the remaining lead foreman, with Hannah's full permission.

Based on the testimony of Harrison and Morrow, I find that Harrison did not request to be transferred. I am further persuaded in this regard by the ALJ's failure to credit Ehele's account of the February 2 hallway meeting. As discussed above, Harrison's communication was protected activity, and Respondent's decision to transfer him because of that activity was unlawful.

CONCLUSION

I find that Complainant Douglas Harrison was demoted, in part, because of his participation in the firewatch complaint and that Respondent has failed to demonstrate that it would have demoted him even if he had not engaged in that protected

activity. I also find that the subsequent transfer to the outside crew was retaliatory. Accordingly, Respondent Stone & Webster Engineering Group is directed to compensate Complainant for the two dollar an hour differential between lead foreman and foreman wages from February 2, 1993, until the April 14, 1993, layoff.[10] Complainant is awarded costs and expenses, including attorney fees, reasonably incurred in bringing the complaint. Complainant is granted a period of 20 days from the date of this order to submit any petition for costs and expenses. Respondent thereafter may respond to any petition within 40 days of the date of this order.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
During the 30-minute "cool down" period following the conclusion of any welding, grinding, burning, or other "hot" work, the ironworkers involved were responsible for policing their work stations watching for fire. Under Respondent's scheduling, however, the ironworkers exited immediately upon concluding their hot work, and only two laborer "rovers" policed all work stations. Harrison testified: "I know that I have had my foremen working in enough different places on one elevation that two rovers could not physically see within their scope of view everywhere that was being worked." Hearing Transcript (T.) 34. *See* T. 208-209, 267-273.

[2]
Harrison contacted the NRC a second time to complain about his demotion which he attributed to the firewatch complaint.

[3]
Hannah's journal entry reflects that the decision to transfer Harrison outside was made on February 3. T. 535.

[4]
Morrow's testimony is consistent: "[Ehele] said [a]s long as Doug Harrison is in the drywell, the drywell ironworkers are going to look up to him, and he stands up there like Moses at the Red Sea, so go down there and get him out. And I said -- it took me by surprise. I said do you want a man? Do you want to swap a man? He said no. Go down there and get him out. If he's in the

dry well, get him out." T. 331. Morrow testified that upon locating Harrison, he (Morrow) said: "Big Boy, what the hell have you done? And [Harrison] looked up at me kind of funny. I said you're going to the outside. And I said what have you done. You've done something. . . . What were you doing?" T. 329.

[5]
While some ironworkers also complained about the division of firewatch duties between ironworkers and laborers, and Respondent initially perceived the complaint as a labor dispute, Harrison's concern was safety.

[6]
By demoting Harrison to foreman and concomitantly demoting the previous foreman to journeyman, the supervisory ratio becomes five journeymen for each foreman (30 journeymen and six foremen), rather than the six to eight journeymen per foreman envisioned by Butts. This figure does not include Willis and Fulks who performed paperwork and were supervised directly by a senior construction supervisor. T. 544-545, 648.

[7]
The ALL is incorrect when he states that "no inference of discriminatory motive can be drawn from the fact that Complainant's demotion closely followed his internal report of fire watch concerns." R. D. and O. at 28. Rather, a causal connection may be established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v. Baldrige,* 759 F.2d 80, 86 and n.6 (D.C. Cir. 1985); *Burrus v. United Telephone Co. of Kansas, Inc.,* 683 F.2d 339, 343 (10th Cir.), *cert. denied,* 459 U.S. 1071 (1982).

[8]
Harrison initially worked "odd jobs" on the outside crew. T. 71. He testified: "[T]here was an oil yard out by a well test shop that had some re-bar sticking up in it, and they wanted somebody to go out and weld them down. So I went out and welded that down." *Id.*

[9]
"Critical path is a term used to describe work that is directly in the path of things that have to be done to get that reactor back on line and producing power. It means it has to be done before the unit can be restarted." T. 70.

[10]
The extent to which the layoff may have been retaliatory was not at issue in this complaint.